

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIEL GREEN,	§	
	§	No. 692, 2009
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0810003789
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: May 12, 2010

Decided: June 7, 2010

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 7th day of June 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Daniel Green (“Green”), the defendant below, appeals from a Superior Court order determining that he had violated his probation, and sentencing Green to imprisonment followed by another probation period. Green claims that the Superior Court erred in finding that he violated his probation, because when the alleged violation occurred, Green was no longer on probation. We reverse the Superior Court judgment that Green violated his probation, and vacate the sentence imposed for that violation.

2. On October 23, 2008, Green pled guilty to obtaining a controlled substance by fraud. He was sentenced to one year Level V incarceration, with credit for 18 days previously served, suspended for one year of Level II probation.

3. On July 8, 2009, Green was arrested on a capias issued by the Court of Common Pleas for failure to pay a fine. He was held at a Level V facility until the Superior Court found Green had violated his probation. On August 13, 2009, the Superior Court sentenced Green, effective July 8, 2009, to one year at Level V, suspended for 90 days at the Level IV VOP Center, with no probation to follow (the “first VOP sentence”).¹ Green was to be held at Level V until space was available at the VOP Center.

4. Green moved *pro se* for a reduction or modification of his sentence under Superior Court Criminal Rule 35. Green argued that the Department of Correction improperly implemented the first VOP sentence, by failing to credit him for the time he previously served at Level V (*i.e.*, from July 8, 2009 to August 13, 2009), because the Department fixed August 13, 2009 as the “start date” for his 90 day sentence. The Superior Court denied that motion, finding that Greene “was sentenced on 8/13/09 but the effective date was 7/8/09.” Green did not appeal.

¹ There is no indication in the record that Green was held at Level V from July 8, 2009 to August 13, 2009. The State, however, does not contest Green’s representation that he was incarcerated at Level V during that period.

5. On October 26, 2009, Green was charged with a second violation of probation for being involved in a fight that occurred at the VOP Center on October 23, 2009. On November 5, 2009, the Superior Court found Green guilty of that second VOP. The Court sentenced Green, effective October 23, 2009, to one year Level V incarceration, suspended for 60 days at the Level IV VOP Center, followed by three months at Level III. This appeal followed.

6. Green claims that the Superior Court erred in finding that he had violated his probation by engaging in a fight at the VOP Center on October 23, 2009, because he should have been released from the VOP Center 3 weeks before—*i.e.*, on October 6, 2009. Green’s claim rests on his interpretation of the sentence order for the first VOP. That order reads as follows:

Effective July 8, 2009 the defendant is sentenced as follows:

The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5.

Suspended for 90 day(s) at supervision level 4 **VOPCENTER**

No probation to follow.

Hold at supervision level 5 until space is available at supervision level 4 **VOPCENTER**.

7. Green claims that the July 8, 2009 “effective” date means that the start date for his 90 day incarceration at the VOP Center should have been July 8, 2009, so that he should have been released from the VOP Center on October 6, 2009. Had that occurred, then at the time of the prison fight that led to his second VOP

determination (October 23), Green would no longer be in custody.² Green's claim rests on the application of two principles. The first is that incarceration at the Level IV VOP Center is "as restrictive as Level V incarceration,"³ and thus entitles a defendant incarcerated at the Level IV VOP Center to Level V credit.⁴ The second is that "a defendant must be given Level V credit for all prior time actually served at Level V incarceration when further incarceration at Level V is imposed after a probation violation."⁵ Stated differently, Green argues that incarcerating him at the VOP Center for a probation violation was equivalent to imposing further incarceration on him at Level V. Therefore, Green should have been credited for the time he spent at Level V between the date of his arrest (July 8, 2009) and the date of his sentence (August 13, 2009).⁶ Because the sentence order provided that

² Green claims that with good-time that should have been credited, he should have been released from the VOP Center on September 30, 2009.

³ *Anderson v. State*, 913 A.2d 569 (Table), 2006 WL 3931460, at *1 (Del. Dec. 5, 2006).

⁴ *Id.* See also Sentencing Committee Memorandum No. 4 titled "Commencement of the Level IV Portion of Sentence where Level V is Suspended on the Date of Sentencing," at *2 ("Sentac Memo") available at http://courts.delaware.gov/Courts/Superior%20Court/pdf/?sentencing_4.pdf (Superior Court Website) (providing that the legal status of a defendant held at the VOP Center is that of a Level V detentioner).

⁵ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999). See also 11 Del. C. § 3901(b) (providing that "[a]ll sentences for criminal offenses of persons who at the time sentence is imposed are held in custody in default of bail, or otherwise, shall begin to run and be computed from the date of incarceration for the offense for which said sentence shall be imposed.").

⁶ Only Level IV incarceration at the VOP Center is equivalent to Level V incarceration. Other Level IV punishments (e.g., work release or home confinement), although considered "quasi incarceration," will not be credited against a Level V sentence. See *Gamble*, 728 A.2d at 1172; *DiStefano v. State*, 913 A.2d 569 (Table), 2006 WL 3353117, at *1 (Del. Nov. 17, 2006).

no probation would follow Green's incarceration at the VOP Center, Green was not lawfully on probation when the prison fight occurred. Consequently, the Superior Court lacked authority to find that he had violated his probation by reason of his involvement in that fight.⁷

8. The State advocates a different interpretation of the first VOP sentence order, namely, that the July 8, 2009 effective date took into account the time Green had previously served at Level V before sentencing. The State claims that having taken that time into consideration, the Superior Court imposed an *additional* period of incarceration on Green—90 days at the VOP Center—which began on August 13, 2009. Stated differently, the State urges that the Superior Court intended to sentence Green to a total of 126 days (90+36) for the first VOP. On that basis, Green's sentence would not expire until November 11, 2009. Therefore, Green's sentence had not expired on October 23, 2009, when Green engaged in the fight at the VOP Center.⁸ The State concedes that if Green's interpretation of the sentence order is the correct one, then the Superior Court lacked authority to find him guilty of the second VOP.

⁷ Green raised this claim at his VOP hearing on November 5, 2009. The Superior Court responded that “[y]ou make a good point, if what you’re saying is correct, but that doesn’t mean that you’re allowed to engage in fighting.” The Superior Court also stated that it will take Green’s argument into account, together with Green’s “numerous violations” of probation.

⁸ The State concedes, however, that in sentencing Green for the second VOP, the Superior Court failed to credit him for 138 days that he had already served.

9. This Court normally reviews a Superior Court finding that a defendant violated probation for abuse of discretion.⁹ Here, however, Green’s claim requires this Court to interpret the Superior Court’s sentence order on the first VOP, not to review its finding of a second VOP. The interpretation of a sentence order should, whenever possible, give effect to the Superior Court’s intent.¹⁰ In ascertaining that intent, “it must be presumed that each element of a sentence imposed by the Superior Court contributes logically to its overall ‘sentencing scheme.’”¹¹

10. The State’s suggested interpretation of the first VOP sentence order renders it ambiguous, if not self-contradictory. The reason is that that order not only suspended Green’s Level V sentence for incarceration at the VOP Center, but also stated that no probation will follow that incarceration. As already noted, sentencing Green to 90 days at the VOP Center was equivalent to sentencing him to 90 days at Level V. Therefore, sentencing Green to 90 days at the VOP center, *with no probation to follow* was equivalent to a sentence of 90 days at Level V, with no probation to follow. But, that sentence seemingly contradicts the first part of the sentence order, which sentenced Green to *one year* at Level V. At the very least, the sentence order is ambiguous.

⁹ *Kurzman v. State*, 903 A.2d 702, 716 (Del. 2006).

¹⁰ *Nave v. State*, 783 A.2d 120, 123 (Del. 2001).

¹¹ *Burton v. State*, 810 A.2d 349 (Table), 2002 WL 31649165, at *2 (Del. Nov. 20, 2002).

11. The State attempts to sidestep that ambiguity by claiming that the Superior Court intended for Green to serve 90 days *specifically* at the VOP Center. But what the sentencing order actually instructs is that Green shall be held at Level V until space is available at the VOP Center.¹² Thus, if no space was available, Green could have served his entire sentence at a Level V facility. The State does not (nor can it) contest that in such a case, Green would have been entitled to credit for the time previously served at Level V.¹³ Here, because the sentence order instructs that Green be held at Level V until space is available at the VOP Center, a sentence of 90 days specifically at the VOP Center—in addition to any (unspecified) term served at Level V—would be impermissible, because such a sentence would have no determined starting and ending dates, and could last indefinitely.¹⁴

12. A sentence that is ambiguous as to the time and manner in which it is to be served, or is internally contradictory, or is uncertain as to its substance, is

¹² Indeed, Green claims that he was transferred from a Level V facility to the VOP Center only on September 11, 2009.

¹³ See Sentac Memo, at *2 (instructing that “where the defendant is held post-date of sentencing at Level 5 waiting to go to Level 4 ... time waiting at Level 5 post-date of sentencing to go to Level 4 is credited to *both* the Level 4 portion of the sentence and the underlying Level 5 term.” (emphasis in original)).

¹⁴ 11 Del. C. § 3901(a) (providing that “[w]hen imprisonment is a part of the sentence, the term shall be fixed, and the time of its commencement and ending specified.”); *Brown v. State*, 793 A.2d 306, 308 (Del. 2002) (holding a sentence was deficient because the trial judge failed to specify either the length or the ending of the defendant’s prison term).

legally invalid.¹⁵ If interpreted in the manner suggested by the State, the sentence order on Green's first VOP is flawed in all three respects.¹⁶ Therefore, that order is better interpreted in the manner advocated by Green, which leads to the conclusion that as of October 23, 2009, Green was neither legally in custody nor on probation, and therefore could not have violated his probation on that date.¹⁷ As a result, the Superior Court lacked authority to find Green guilty of a second VOP and to sentence him on that violation.

NOW, THEREFORE, IT IS ORDERED that the Superior Court's judgment that Green violated his probation on October 23, 2009, is **REVERSED** and the November 5, 2009 sentence order is **VACATED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁵ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

¹⁶ An illegal sentence may be corrected at any time. *See* Superior Court Criminal Rule 35(a). Therefore, Green's failure to appeal from the denial of his Rule 35(a) motion does not bar this Court from deciding this issue within the framework of an appeal from a subsequent (and dependent) sentence. *See Wilson v. State*, 902 A.2d 102 (Table), 2006 WL 1291369, at *2 (Del. May 9, 2006) (hearing an appeal from the denial of a Rule 35(a) motion "in the context" of an appeal from the denial of a Rule 61 motion, in the interest of judicial economy).

¹⁷ Green admitted to fighting at the VOP Center. It is possible that he could have been charged with assault, or assault in a detention facility. Such charges would have required more formal proceedings than the "informal and summary" VOP proceedings. *See Weaver v. State*, 779 A.2d 254, 259 (Del. 2001); *Kurzman*, 903 A.2d at 716.